

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Joint Application of)
T-MOBILE USA, INC. and SPRINT)
COMMUNICATIONS COMPANY L.P.)
for Waiver of Regulatory Requirements or,)
in the Alternative, Approval of the)
Proposed Indirect Transfer of Control of)
Sprint Communications Company L.P.)
_____)

DOCKET NO. 2018-0157

DECISION AND ORDER NO. 36341

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Proposed Indirect Transfer of Control of)	
Sprint Communications Company L.P.)	
)	

DECISION AND ORDER

By this Decision and Order, the commission approves, subject to certain conditions, T-MOBILE USA, INC. and SPRINT COMMUNICATIONS COMPANY L.P.'s Joint Application for Waiver of Regulatory Requirements or, in the Alternative, Approval of the Proposed Indirect Transfer of Control of Sprint Communications Company L.P., filed on July 6, 2018, as set forth below.¹

¹Joint Application of T-Mobile USA, Inc. and Sprint Communications Company L.P. for Waiver of Regulatory Requirements or, in the Alternative, Approval of the Proposed Indirect Transfer of Control of Sprint Communications Company L.P.; Exhibit "A"; Verifications; and Certificate of Service, filed on July 6, 2018 (collectively, "Joint Application"). T-MOBILE USA, INC. ("T-Mobile USA") and SPRINT COMMUNICATIONS COMPANY L.P. ("Sprint Communications"), are hereafter collectively referred to as the "Applicants." The "Parties" refers to: (1) the Applicants; and (2) the Consumer Advocate, an ex officio party to this proceeding pursuant to Hawaii Revised Statutes ("HRS") § 269-51 and Hawaii Administrative Rules ("HAR") § 16-601-62(a). On January 4, 2016, the Consumer Advocate filed

The commission, in approving the Proposed Indirect Transfer of Control, specifically approves the merger transaction ("merger transaction" or "transaction") that will result in Sprint Communications becoming an indirect wholly owned subsidiary of T-Mobile USA (the Indirect Competitive Local Exchange Carrier (CLEC) Acquisition, hereafter, "Indirect CLEC Acquisition" or "acquisition"), subject to the conditions described in this Order.

I.

BACKGROUND

A.

Applicants and Related Entities

T-Mobile USA is a Delaware corporation, and a subsidiary of T-Mobile US, Inc. ("T-Mobile"). T-Mobile, a publicly traded Delaware corporation, is controlled by Deutsche Telekom AG ("Deutsche"), which indirectly holds approximately 62% of T-Mobile's stock.²

Sprint Communications is a Delaware limited partnership, and an indirect wholly owned subsidiary of Sprint Corporation ("Sprint"). By Decision and Order No. 13262, filed

its preliminary position statement, stating its intent to participate in the subject proceeding. No persons moved to intervene or participate in this proceeding.

²Joint Application at 3.

on May 17, 1994, in Docket No. 94-0005, the commission granted Sprint Communications a Certificate of Public Convenience and Necessity to provide intrastate interexchange telecommunications services in Hawaii.³

SoftBank Group Corp. ("SoftBank"), a Japanese, Tokyo-based corporation and holding company, provides mobile and fixed-line services in Japan through its telecommunications subsidiary, SoftBank Corp.⁴ In 2013, SoftBank, through its subsidiary holding companies, acquired an approximately 78 percent indirect interest in the entity that is now Sprint.⁵

According to Applicants, T-Mobile formed two indirect subsidiaries in anticipation of the merger transaction: Huron Merger Sub LLC ("Huron"); and Superior Merger Sub Corporation ("Superior").⁶

³Joint Application at 4.

⁴Joint Application at 4.

⁵Joint Application at 4 n.6. SoftBank obtained this interest via Starburst I, Inc. ("Starburst") and Galaxy Investment Holdings, Inc. ("Galaxy"), both Delaware corporations. Joint Application at 5 n.7. As of December 2017, SoftBank held an approximately 84.2 percent indirect interest in Sprint (77.2 percent through Starburst and 7.0 percent through Galaxy). Joint Application at 5.

⁶Joint Application at 5, wherein Applicants elaborate that Huron is a Delaware limited liability company and a wholly owned subsidiary of T-Mobile, and Superior is a Delaware corporation and a wholly owned subsidiary of Huron. Neither company is a regulated operating entity.

B.

Procedural History

On July 6, 2018, Applicants filed the Joint Application, and thereafter, filed a proposed stipulated procedural order on September 10, 2018. On October 2, 2018, the commission issued Order No. 35729 Adopting, With Modifications, The Parties' Proposed Stipulated Procedural Order ("Order No. 35729") which set forth a procedural schedule to govern this proceeding.

Pursuant to Order No. 35729, the Consumer Advocate issued information requests ("IRs") to Applicants on September 10, 2018. Applicants timely responded to the Consumer Advocate's IRs on October 1, 2018 ("Response to CA IRs").⁷

⁷Applicants also provided additional supplemental responses to the Consumer Advocate's IRs. See: Applicants' "Joint Responses to Division of Consumer Advocacy's Submission of Information Requests," "Confidentiality Log," "Exhibits CA-IR-1.a.4.a and CA-IR-1.a.4.b," and "Certificate of Service," filed on October 1, 2018; Applicants' "Supplemental Response to CA-IR-5, -6, -8, and -9," "Confidentiality Log," "Exhibits CA-IR-2-a-1 and -2.b.3," Errata Pages 2, 3, 4," and "Certificate of Service," filed on October 2, 2018 ("Applicants' Supplemental IR Response"); Applicants' "Second Supplemental Response to CA-IRs-5a, 6b, 6d and 10a," "Confidentiality Log," "Exhibits CA-IR-5 and CA-IR-6(d)," and "Certificate of Service," filed on October 16, 2018; and Applicants' "Third Supplemental Response to CA-IR-6(d)," "Confidentiality Log," "Exhibits CA-IR-6(d)(1), 6(d)(2) and 6(d)(3)," and "Certificate of Service," filed on October 24, 2018.

On October 29, 2018, the Consumer Advocate filed its Statement of Position.⁸ And on November 16, 2018, Applicants filed their response to the CA SOP.⁹

On January 24, 2019, the commission issued Order No. 36116 Instructing the Consumer Advocate to File a Response. The Consumer Advocate thereafter timely filed its response to Applicants' CA SOP Response.¹⁰

During this time, the commission also issued an information request ("IR") to Applicants,¹¹ who timely responded thereto on February 28, 2019.¹²

⁸"Division of Consumer Advocacy's Statement of Position" ("CA SOP").

⁹"T-Mobile USA, Inc. and Sprint Communications Company L.P.'s Response to Division of Consumer Advocacy's Statement of Position" ("Applicants' CA SOP Response").

¹⁰"Division of Consumer Advocacy's Response to Applicants' Reply," filed on February 8, 2019 ("CA February Response").

¹¹See the commission's letter dated February 8, 2019, and the accompanying IR (PUC-IR-101 (a) and (b)).

¹²See "T-Mobile USA, Inc. and Sprint Communications Company L.P.'s Response to the State of Hawaii Public Utilities Commission's Information Request PUC-IR-101 (A) and (B)," and "Certificate of Service."

On February 15, 2019, Applicants filed a motion for leave¹³ to file a reply to the CA February Response.¹⁴ By Order No. 36196, issued on March 1, 2019, the commission granted Applicants' Motion for Leave.¹⁵

On April 3, 2019, the Parties filed a Stipulation, in which, pursuant to certain commitments from Applicants, the Consumer Advocate "agrees to support, and advocate for to the extent necessary, the [c]ommission's expeditious approval of the stipulation and Indirect CLEC Acquisition[,] and "agrees not to oppose the Merger in any forum."¹⁶

¹³"Motion for Leave to File a Reply to Division of Consumer Advocacy's Response to Applicants' Response to Division of Consumer Advocacy's Statement of Position Filed on February 8, 2019," filed on February 15, 2019 ("Motion for Leave").

¹⁴Applicants attached, as Exhibit "A" to their Motion for Leave, their reply to the CA February Response ("Applicants' February Reply").

¹⁵Order No. 36196, "Granting Applicants' Motion for Leave to File a Reply and Requiring Response from the Consumer Advocate" ("Order No. 36196"), wherein the commission ordered the Consumer Advocate to file, by March 11, 2019, its response to Applicants' February Reply ("CA March Response"). On March 7, 2019, the Consumer Advocate filed a Motion for Enlargement of Time ("Motion to Enlarge"), to request an extension of the March 11, 2019 deadline to March 14, 2019. On March 13, 2019, the commission granted the Consumer Advocate's Motion to Enlarge (Order No. 36217), and the Consumer Advocate thereafter timely filed the CA March Response.

¹⁶Letter re: Docket No. 2018-0157 from Applicants and Consumer Advocate to the commission, dated April 3, 2019, and Exhibit 1 ("Stipulation").

II.

POSITIONS

A.

Joint Application

By their Joint Application, Applicants explain that T-Mobile and Sprint, among others, have entered into a business agreement ("BA")¹⁷ by which an all-stock transaction will result in Sprint Communications becoming an indirect wholly owned subsidiary of T-Mobile USA (the Indirect CLEC Acquisition),¹⁸ by Sprint becoming a wholly owned subsidiary of T-Mobile USA, and an indirect subsidiary of T-Mobile.¹⁹ By their Joint Application, Applicants seek a waiver from all regulatory requirements relating to the Indirect CLEC Acquisition, or, alternatively, approval of said acquisition, pursuant to HRS §§ 269-19(a) and 269-7(a), to the extent such relief is necessary and appropriate.²⁰

¹⁷The BA sets forth the structure and steps of the merger transaction. Joint Application at 6.

¹⁸Joint Application at 2.

¹⁹Joint Application at 3 and 6.

²⁰HRS § 269-7(a) authorizes the commission to examine the conditions of each public utility, its financial transactions, and "all matters of every nature affecting the relations and transactions between it and the public or persons or corporations." Under HRS § 269-19, a public utility must obtain commission approval to sell, lease, assign, mortgage, dispose of,

Waiver of Regulatory Requirements

According to Applicants, the merger transaction will be accomplished through several, virtually simultaneous steps, beginning with Galaxy's and Starburst's merger with and into Huron, and with Huron continuing as the surviving corporation. Thereafter, Superior will merge with and into Sprint, and Sprint will continue as the surviving entity. Finally, Huron will distribute Sprint stock to T-Mobile, which T-Mobile will then contribute to its direct subsidiary, T-Mobile USA.²¹ Upon completion of these steps, Sprint Communications will be an indirect, wholly owned subsidiary of T-Mobile USA,²² and following the merger transaction, Sprint Communications will not otherwise experience a change in control and will continue to operate as a subsidiary of Sprint.²³ T-Mobile USA will continue to be a wholly owned subsidiary of T-Mobile following the

or encumber the whole or any part of its property that is necessary or useful in the performance of its duties as a public utility.

²¹Joint Application at 6.

²²Joint Application at 6, wherein Applicants elaborate that Deutsche and SoftBank are expected to hold approximately 42 percent and 27 percent of the fully diluted shares of T-Mobile Common Stock, respectively, with the approximately 31 percent remaining fully diluted shares of T-Mobile Common Stock held by public stockholders.

²³Joint Application at 7.

transaction, and T-Mobile will continue to operate as T-Mobile and trade as "TMUS."²⁴

Applicants explain that pursuant to HRS § 269-16.9(e), the commission may waive the regulatory requirements applicable to telecommunications providers upon a determination that competition will serve the same purpose as public interest regulation. Likewise, HAR § 6-80-135 allows the commission to waive the provisions of HRS Chapter 269 or any other telecommunications-related rule upon the commission's determination that the waiver is in the public interest.²⁵

Because Sprint Communications is a non-dominant carrier in the State of Hawaii ("State"), Applicants assert that the commission should waive all regulatory requirements related to the Indirect CLEC Acquisition.²⁶

²⁴Joint Application at 7. Applicants also note therein that the merger transaction is conditioned upon receipt of the approval of the shareholders of both T-Mobile and Sprint, and the required regulatory and other governmental consents, including approval of the Federal Communications Commission ("FCC") and review by the U.S. Department of Justice.

²⁵Joint Application at 7-8 (footnotes omitted), wherein Applicants note that in determining whether competition will serve the same interest as public interest regulation, the commission has routinely granted waivers pursuant to HRS § 269-16.9(e) and HAR § 6-80-135(a) where the affected telecommunications carrier is a non-dominant carrier.

²⁶Joint Application at 8.

Approval of the Indirect CLEC Acquisition

Should the commission determine that the requested waiver is not appropriate, Applicants alternatively request that the commission approve the Indirect CLEC Acquisition, pursuant to HRS §§ 269-19(a) and 269-7(a).²⁷

According to Applicants, the commission has jurisdiction²⁸ to review and approve transfers of control occurring at the level of a public utility's parent company to determine whether the transaction is reasonable and consistent with the public interest; a transfer is reasonable and consistent with the public interest if it will not adversely affect the carrier's fitness, willingness, and ability to provide intrastate telecommunications services in the State as authorized by the commission.²⁹

Applicants explain that pursuant to HRS § 269-19(a), the commission has reviewed applications to transfer indirect control of telecommunications carriers by incorporating the standards of HRS § 269-7.5.³⁰

²⁷Joint Application at 2 and 8-9.

²⁸See HRS § 269-7(a).

²⁹Joint Application at 9 (footnotes omitted).

³⁰Joint Application at 9. HRS § 269-7.5 requires that (a) the applicant be fit, willing and able to properly perform

Applicants assert that the acquisition is "in the public interest," and satisfies the fitness standard, noting, among other things, the following: Sprint Communications will remain a wholly owned indirect subsidiary of Sprint and will continue to provide the services it currently provides to customers in the State, subject to Sprint Communications' existing plans to discontinue its TDM (time-division multiplexing) services and transition customers to Internet Protocol ("IP") services; all existing Sprint Communications contracts will be honored; and there is no risk of competitive harm resulting from the wireline operations of Sprint Communications being acquired indirectly by a new corporate parent, as neither T-Mobile USA nor its subsidiaries have a registered entity in the State that provides competing wireline services.³¹ Not only will the acquisition "not adversely affect the carrier's fitness, willingness, and ability to provide intrastate telecommunications services in the State as authorized by the commission," but Applicants point out that the acquisition will increase the managerial, technical, and financial resources available to Sprint Communications.³² This will allow Sprint

the service proposed, and (b) the acquisition is reasonable and in the public interest.

³¹Joint Application at 10.

³²Sprint Communications will become part of a larger entity with substantial financial resources, which will allow it to deploy a more extensive network to the benefit of its existing

Communications to compete more effectively in the marketplace to the benefit of consumers in Hawaii.³³

Applicants finally note that the Indirect CLEC Acquisition is reasonable and consistent with the public interest because it will not adversely affect Sprint Communication's fitness, willingness, and ability to provide reliable services in the State, but instead, is expected to enhance the services of the merged companies.³⁴

B.

Consumer Advocate's Statement of Position

On October 29, 2018, the Consumer Advocate filed its Statement of Position, ("CA SOP"), and therein recommended that the commission "deny [Applicants'] request to waive all regulatory requirements relating to a merger transaction that will result in [the Indirect CLEC Acquisition]."³⁵ The Consumer Advocate also stated that it "does not support" Applicants' request for approval

customers, and to offer a wider array of services that can be bundled with wireless services. Joint Application at 10.

³³Joint Application at 10.

³⁴Joint Application at 11.

³⁵CA SOP at 1.

of the Indirect CLEC Acquisition pursuant to HRS §§ 269-19(a) and 269-7(a).³⁶

1.

Waiver of Regulatory Requirements

While the Consumer Advocate acknowledges Applicants' representation that, among other things, Sprint Communications is a "non-dominant carrier in the Hawaii market for telecommunications services,"³⁷ the Consumer Advocate believes that Applicants: have not provided information to support the assertions regarding the current overall market share that either T-Mobile or Sprint Communications has in the Hawaii market;³⁸ and have not offered any analysis that would ease any concerns that the "proposed transaction may result in increases in market power."³⁹ In considering the "apparent market presence" of Applicants, the Consumer Advocate opines that the "impact of

³⁶CA SOP at 2.

³⁷CA SOP at 6 (footnote omitted).

³⁸CA SOP at 3.

³⁹CA SOP at 6-7 (footnotes omitted), wherein the Consumer Advocate adds that while Applicants may have limited numbers of customers with respect to certain services (Sprint Communications no longer offers long distance service, and it has only two private line customers), but they are not insignificant in terms of subscribers of other services in the State.

the proposed merger on Hawaii's prices and telecommunications services is unclear," and it "cannot be presumed that competition serves the same purpose as public interest regulation."⁴⁰ Accordingly, the Consumer Advocate does not believe that Applicants have provided compelling evidence to support the requested waivers.⁴¹

2.

Approval of the Indirect CLEC Acquisition

Should the commission deny Applicants' request for approval of the requested waivers, the Consumer Advocate indicates that "the standard of review for the proposed transaction requires a finding of fitness, willingness, and ability to provide the relevant regulated utility service and that the proposed transaction is in the public interest."⁴²

In reviewing the Indirect CLEC Acquisition, the Consumer Advocate "considered whether the Applicants (and the merged entity would be) are fit, willing, and able to provide relevant regulated utility service in the State," and "believes that the question of technical and managerial fitness and ability

⁴⁰CA SOP at 7.

⁴¹CA SOP at 7.

⁴²CA SOP at 8.

are addressed adequately" as it understands the services that are provided by Applicants.⁴³

Regarding the "reasonable and in the public interest" criterion, the Consumer Advocate observes Applicants' reliance upon the standard that the transaction "is reasonable and that it will not adversely affect the carrier's fitness, willingness, and ability to serve the customers of the regulated utility services in the state."⁴⁴ The Consumer Advocate notes the commission's more recent guidance (i.e. "Appendix A")⁴⁵ as to the

⁴³CA SOP at 8-9 (footnotes omitted), wherein the Consumer Advocate also acknowledges that the entities appear willing to continue providing the services they provide to their customers, and wherein it finds that the standard for financial fitness has been met.

⁴⁴CA SOP at 9 (footnote omitted).

⁴⁵The Consumer Advocate identifies "Appendix A," which is attached to Order No. 33795, "Dismissing Application Without Prejudice and Closing Docket" ("Order No. 33795"), in Docket No. 2015-0022. Docket No. 2015-0022 involved the proposed merger between the Hawaiian Electric Companies (collectively, Hawaiian Electric Company, Inc., Hawaii Electric Light Company, Inc., and Maui Electric Company, Limited) and NextEra Energy, Inc. ("NextEra"). By Appendix A, the commission set forth specific guidance concerning the elements and issues that should be included and addressed in any future application addressing a proposed merger, acquisition, or other change of corporate control involving the Hawaiian Electric Companies or other utilities in the State. The commission has since clarified the guidance offered in Order No. 33795, by Decision and Order No. 35427, issued on April 30, 2018, in Docket No. 2017-0208 ("Cincinnati Bell Decision"). CA SOP at 10.

legal standard for evaluating transactions like the one proposed in this proceeding.⁴⁶

The Cincinnati Bell Decision referenced the parties' notation that while Appendix A identified six elements that the commission deemed relevant to the public interest standard in the proposed merger between the Hawaiian Electric Companies and NextEra, two elements, "achievement of the state's clean energy goals" and "the H[awaiian Electric] Companies' transformation" were inapplicable to Cincinnati Bell or the telecommunications industry.⁴⁷ The commission, in the Cincinnati Bell Decision, explained that Appendix A was not directly applicable to Docket No. 2017-0208, however, "[th]is is not to say that the elements set forth in Appendix A are completely inapplicable to the proposed merger [herein]; considerations such as ratepayer benefits, mitigation of risk, effects on competition, and corporate governance are, to a certain degree, pertinent factors in any proposed change of control proceeding."⁴⁸

⁴⁶CA SOP at 10.

⁴⁷Cincinnati Bell Decision at 31 (footnote omitted), 53.

⁴⁸CA SOP at 10 (footnote omitted), wherein the Consumer Advocate adds that the mitigation of risk and corporate governance issues do not need further attention in this proceeding (i.e., Docket No. 2018-0157).

The Consumer Advocate maintains that it is necessary for Applicants to establish that the Indirect CLEC Acquisition "will result in clear and quantifiable benefits to Hawaii consumers to meet the public interest standard."⁴⁹

The Consumer Advocate maintains that the effects of the acquisition on competition are unclear, and it suggests that while Applicants seek to limit the commission's review to only the limited wireline operations of Sprint Communications, it would be reasonable for the commission to review the potential impact the acquisition might have on the State's wireless markets.⁵⁰ Based in part on the foregoing, the Consumer Advocate concludes that Applicants have not provided sufficient, reliable evidence to reasonably determine that the proposed transaction will deliver significant net benefits to Hawaii customers. And as such,

⁴⁹CA SOP at 11-13 (footnote omitted), wherein the Consumer Advocate explains that while Applicants have made various assertions regarding the benefits to Hawaii consumers, Applicants "generally objected" to the Consumer Advocate's requests to provide supporting information. Applicants did, however, provide supplemental responses (including, for example, estimates of projected reductions in the price per GB (gigabyte) with and without the acquisition, as estimates of national level customer savings), of which the Consumer Advocate questioned the accuracy and reliability. In this example, the Consumer Advocate found that the estimates appeared to be based on modeling done at the national level, and, therefore, did not address the intent of the respective requests for information which were issued to ascertain State-specific estimates of customer benefits and price drops.

⁵⁰CA SOP at 14.

Applicants will need to establish that the acquisition will result in clear and quantifiable benefits to Hawaii consumers to meet the public interest standard.⁵¹

C.

Applicants' Response to Consumer Advocate's SOP

On November 16, 2018, Applicants filed their Response to the Consumer Advocate's SOP (Applicants' CA SOP Response), and therein state that the Consumer Advocate "relies on an incorrect standard of review," and that the Consumer Advocate's focus on wireless consumers reaches "beyond the scope of this proceeding."⁵²

1.

Waiver of Regulatory Requirements

Applicants argue that because the commission has waived all regulatory requirements for parent-level mergers of CMRS providers, the indirect transfer of control of Sprint

⁵¹CA SOP at 16-17.

⁵²Applicants' CA SOP Response at 2-3, noting that while the Consumer Advocate concedes Applicants' fitness, willingness, and ability to maintain telecommunications services as they are authorized to do so in the State, its "concerns about competition in the wireless market in which Applicants' commercial mobile radio service ('CMRS') subsidiaries and/or affiliates operate" comprise the sole basis for the Consumer Advocate's opposition to Applicant's requested waiver.

Corporation's and T-Mobile USA's wireless subsidiaries and/or affiliates operating in the State is not subject to review of the commission, pursuant to HRS § 269-19(a), and consistent with Decision and Order No. 20890, filed on April 7, 2004, in Docket No. 03-0186 (the "CMRS Order").⁵³

Applicants also argue that the commission should grant Applicants' request for waiver of HRS §§ 269-19(a) and 269-7(a), because the Indirect CLEC Acquisition will have no adverse impacts on competition in the wireline market.⁵⁴ As earlier explained, HRS § 269-16.9(e) authorizes the commission to waive the regulatory requirements applicable to telecommunications providers when it determines that competition will serve the same purpose as public interest regulation (the commission considers

⁵³Applicants' CA SOP Response at 3 (footnotes omitted), wherein Applicants explain that by the CMRS Order, the commission concluded that HRS § 269-19(a) should be waived with respect to CMRS providers operating in Hawaii, "provided that a CMRS provider operating in the State will provide the [c]ommission and the Consumer Advocate with a notice of a merger or consolidation with any other non-affiliated public utility operating in the State on or around the same day an FCC-required application for approval of such merger or consolidation is filed with the FCC." The record reflects that Applicants, on behalf of their respective wireless operating subsidiaries registered as CMRS providers by the commission, provided the required notice to the commission and the Consumer Advocate on June 22, 2018.

⁵⁴Applicants' CA SOP Response at 6.

whether a carrier is a non-dominant carrier when making this determination).⁵⁵

Comparatively, Applicants note the following in the instant matter: Sprint Communications provided voice intrastate telecommunications service to only two enterprise customers who were scheduled to discontinue receiving those regulated services as of December 31, 2018;⁵⁶ the Indirect CLEC Acquisition will not lead to an undue concentration of market power (T-Mobile does not own infrastructure in Hawaii that is used or may be used to provide

⁵⁵In determining whether a carrier is a non-dominant carrier, the commission is concerned about market share and whether the resulting carrier is or will become a dominant carrier after the proposed transaction which could diminish competition in the intrastate telecommunications market. Applicants' CA SOP Response at 6 (footnote omitted).

In granting waivers, the commission has focused on considerations such as: the acquired carrier's customer counts and intrastate revenues; whether the acquisition would lead to an undue concentration of market power; the acquiring carrier's fitness, willingness, and ability to provide intrastate telecommunications services; the acquiring carrier's commitment to meeting the acquired carrier's contractual and regulatory obligations to its customers; and the lack of opposition to the proposed transfer from other Hawaii intrastate telecommunications carriers or members of the public. Applicants' CA SOP Response at 7 (footnote omitted).

⁵⁶Applicants' CA SOP Response at 7 (footnote omitted), wherein Applicants elaborate that Sprint Communications is in the process of either disconnecting or transferring those final customers, and expects them to be transferred by no later than 2019, at which time, Sprint Communications will be providing only unregulated interstate data, VoIP (Voice over Internet Protocol) services, Internet Access, and IP-based private network services to business and enterprise customers in Hawaii.

wireline services to Hawaii customers, and there will be the same number of wireline intrastate telecommunications providers operating in Hawaii immediately after consummation of the Indirect CLEC Acquisition, as there were immediately prior);⁵⁷ the record corroborates T-Mobile's fitness, willingness, and ability to maintain telecommunications services as they are authorized to do so in the State;⁵⁸ T-Mobile has committed to meeting its contractual obligations to its customers, making the Indirect CLEC Acquisition seamless to customers;⁵⁹ and there have been no complaints from customers about the Indirect CLEC Acquisition, and no opposition to the acquisition from other telecommunications carriers in the State.⁶⁰ Applicants assert that based on the foregoing, the commission should find it appropriate to waive all regulatory requirements, including those pursuant to HRS §§ 269-7(a) and 19(a), if applicable, to the proposed Indirect CLEC Acquisition.⁶¹

⁵⁷Applicants' CA SOP Response at 8 (footnote omitted).

⁵⁸Applicants' CA SOP Response at 8 (footnotes omitted).

⁵⁹Applicants' CA SOP Response at 8 (footnotes omitted).

⁶⁰Applicants' CA SOP Response at 9 (footnote omitted).

⁶¹Applicants' CA SOP Response at 9.

Approval of the Indirect CLEC Acquisition

Alternatively, Applicants assert that the Joint Application should be approved under HRS §§ 269-7(a) and 269-19(a),⁶² because the Indirect CLEC Acquisition will have no adverse impact on competition for wireline services or on Sprint Communications' customers receiving those services.⁶³ According to Applicants, the Consumer Advocate erroneously contends that Applicants must prove the transaction will result in significant net benefits to Hawaii customers, because a "no detriment" standard of review should instead be applied when examining applications pursuant to HRS §§ 269-7(a) and 269-19(a).⁶⁴

⁶²Applicants have previously explained that the commission has reviewed applications to transfer indirect control of telecommunications carriers pursuant to HRS § 269-19(a), which: incorporates the standards of HRS § 269-7.5; and requires that (a) the applicant be fit, willing and able to properly perform the service proposed ("FWA Test"), and (b) the acquisition is reasonable and in the public interest (meaning that it will cause no harm to competition or to the merging entities' customers). Joint Application at 9; Applicants' CA SOP Response at 11 (footnote omitted).

⁶³Applicants' CA SOP Response at 9.

⁶⁴Applicants' CA SOP Response at 10-11 (footnotes omitted), wherein Applicants identify In the Matter of the Joint Application of Verizon Commc'ns. Inc. and XO Commc'ns Servs., LLC, Docket No. 2016-0076, Decision and Order No. 33873 (Aug. 15, 2016) (the "XO Decision"). The Consumer Advocate emphasizes that by said decision, the commission rejected the "substantial net benefits" test, and instead, applied a "no detriment" policy with respect to impacts on the market for wireline services, even where the applicants also have wireless affiliates.

Acknowledging the Consumer Advocate's concession that Applicants meet the FWA Test, Applicants assert that the Consumer Advocate's claimed inability to support the Indirect CLEC Acquisition rests entirely on the its misapplication of the "public interest" prong in the context of matters beyond the scope of this proceeding.⁶⁵ Applicants do not agree with the Consumer Advocate's position that under the Cincinnati Bell Decision, Applicants must address the Appendix A factors, including proof of "significant net benefits to Hawaii customers, because: the commission rejected a "substantial net benefits" test in favor of the "no detriment" policy in the XO Decision; and the "substantial net benefits" standard "is not found" in the Cincinnati Bell Decision.⁶⁶

a.

Public Interest Under the Applicable Standard

Applicants iterate that HRS §§ 269-7(a) and 269-19(a) are both satisfied upon a showing that the applicant meets the

⁶⁵Applicants' CA SOP Response at 11 (footnote omitted).

⁶⁶Applicants' CA SOP Response at 11-12 (footnotes omitted). In the Cincinnati Bell Decision, the commission stated that a proposed financial transaction at the parent holding company level is reasonable and consistent with the public interest if it will not adversely affect the carrier's fitness, willingness, and ability to provide intrastate telecommunications services in the State, as authorized by the commission.

FWA Test as it relates to the proposed regulated wireline services, and that the acquisition "will cause no harm to competition or to the merging entities' customers."⁶⁷

i.

No Harm to Wireline Competition

With respect to competition, Applicants indicate that the transaction will have no competitive impact on the provision of wireline services to customers in the State.⁶⁸

ii.

Benefit to Wireline Customers

With respect to harm to the merging entities' customers, Applicants note that T-Mobile has no wireline customers in the State, and as such, there can be no harm to that category of customers. According to Applicants, Sprint Communications was providing regulated intrastate voice telecommunications services to only two enterprise customers, one of whom has disconnected from said service, and one who is scheduled to disconnect in

⁶⁷Applicants' CA SOP Response at 13 (footnote omitted).

⁶⁸Applicants' CA SOP Response at 13 (footnote omitted), wherein Applicants mention T-Mobile's lack of infrastructure ownership in the State, and no change in the number of wireline intrastate telecommunications providers operating in Hawaii prior to, and after consummation of the acquisition.

2019.⁶⁹ Applicants clarify that the Sprint Communications' service to the remaining customer will remain unchanged, and its contractual obligations as the intrastate TRS (telecommunications relay services) provider in Hawaii will be fully complied with. In this regard, the acquisition will be seamless to Sprint Communications' customers, and will not impact them.⁷⁰

Applicants further indicate that the acquisition, which will allow Sprint Communications to become part of a much larger entity with increased managerial, technical, and financial resources, will benefit existing Sprint Communications' customers by creating the opportunity to deploy a more extensive network, and offer a wider array of enterprise services that can be bundled with wireless services.⁷¹

⁶⁹Applicants' CA SOP Response at 13-14 (footnote omitted), wherein Applicants clarify that the Sprint Communications' service to the remaining customer will remain unchanged.

⁷⁰Applicants' CA SOP Response at 14 (footnotes omitted).

⁷¹Applicants' CA SOP Response at 15.

b.

Public Interest Under the Inappropriately Heightened Standard
Improperly Asserted by the Consumer Advocate

i.

No Harm to Wireless Competition

Applicants claim that even if the commission were to apply the Consumer Advocate's scope and standard of review (i.e., by considering the impact of the transaction on the wireless marketplace, and by using a "net benefits" test) the record reflects that the transaction is in the public interest (i.e., it will not harm competition or the merging entities' customers, but instead, will increase competition and create significant benefits for those customers and the State's consumers of telecommunications services).⁷² Applicants further represent that the pro-competitive benefits apply equally to the national

⁷²Applicants' CA SOP Response at 15-16 (footnotes omitted), wherein Applicants elaborate that by 2024, the New T-Mobile network will have approximately double the total capacity and triple the total 5G capacity of T-Mobile and Sprint combined. Applicants state that New T-Mobile's nationwide 5G network will spur competitive responses from Verizon, AT&T, and other wireless providers, resulting in as much as a 55% decrease in price per GB and a 120% increase in cellular data supply for all wireless customers. Importantly, customers will benefit by the merged entity's ability to "increase competitive pressures on competing service providers."

and Hawaii market.⁷³ Thus, the acquisition will not harm competition for wireless services in Hawaii.⁷⁴

ii.

Benefit to T-Mobile's and Sprint's Customers and Hawaii Consumers of Telecommunications Services Generally

As Applicants avouch, the transaction will result in significant public benefits accruing to Hawaii and Hawaii consumers, including, among others: a world-leading 5G network with superior capacity, speed, and coverage in the State; increased data and improved service at lower prices for all Hawaii consumers; enhanced broadband and advanced 5G services to the State's rural consumers; a cost-savings alternative to in-home broadband service; "un-cable" video distribution service; better Mobile Virtual Network Operators ("MVNO") options; improved enterprise offerings for businesses; and "IoT" (Internet of things) capabilities that will benefit Hawaii consumers and businesses (collectively, "New T-Mobile Benefits").⁷⁵ Thus,

⁷³Applicants' CA SOP Response at 17, wherein Applicants illustrate that the improved network and lower prices resulting from the planned integration of the T-Mobile and Sprint networks in Hawaii post-closing, will also trigger competitive responses from other wireless providers in Hawaii.

⁷⁴Applicants' CA SOP Response at 17.

⁷⁵Applicants' CA SOP Response at 15-27 (footnotes omitted).

even if the inappropriately heightened standard relied upon by the Consumer Advocate (i.e., the standard which considers the impact of the transaction on the wireless marketplace, and which uses a net benefits test) were applied, Applicants' evidence shows that the Indirect CLEC Acquisition should be approved.⁷⁶

D.

Consumer Advocate's Response

The Consumer Advocate thereafter timely filed its response to Applicants' CA SOP Response (i.e., the CA February Response), and therein claims that some of Applicants' criticisms of the CA SOP are in error and/or misplaced. First, the Consumer Advocate contends that Applicants' assertion that the commission waived all parent-level merger review pursuant to its action in the CMRS Order, is incorrect.⁷⁷

The Consumer Advocate also finds erroneous, Applicants' contention that their request for waiver of HRS §§ 269-19(a) and

⁷⁶Applicants' CA SOP Response at 9-10.

⁷⁷CA February Response at 6 (footnote omitted), wherein the Consumer Advocate points out that although Applicants correctly cite the section of the CMRS Order, they do not acknowledge that the commission, in waiving several sections of HRS § 269 and the HAR, based that waiver on a finding that competition will serve the same purpose as public interest regulation, under HRS § 269-16.9(e).

269-7(a) should be granted as the acquisition will have no adverse impacts on competition in the wireline market.⁷⁸

Relating to Applicants' argument that the Consumer Advocate relied on the incorrect standard of review, the Consumer Advocate offers the support it previously provided in its position statement (CA SOP) to address the same argument.⁷⁹

The Consumer Advocate concludes that the commission should not approve the transaction unless Applicants provide information specific to Hawaii, such as a near-term roll out schedule of 5G for the State, the addition of jobs, or maintaining or expanding the availability of CMRS in rural and/or remote areas.⁸⁰

⁷⁸CA February Response at 6-7 (footnotes omitted), noting: Applicants' discussion that "Sprint currently remains the sole provider of intrastate TRS [in] Hawaii"; and Applicants' failure to reference certain proceedings related to merger transactions in which the commission did not waive HRS § 269-7(a), while referring to Sprint Communications' (one of the applicants in said certain proceedings) integral role in participating in the development of the intrastate wireline telecommunications industry, and as the exclusive provider of intrastate TRS in Hawaii.

⁷⁹CA February Response at 8-10, adding that Applicants did not provide additional information in Applicants' CA SOP Response to address the concerns the Consumer Advocate raised in its position statement (CA SOP) regarding Hawaii specific benefits.

⁸⁰CA February Response at 12.

E.

Applicants' Motion for Leave

On February 15, 2019, Applicants filed their Motion for Leave,⁸¹ which the commission thereafter granted.⁸² Applicants reiterate the positions they articulated in Applicants' CA SOP Response, including, among other things, that the Consumer Advocate relied on an incorrect standard of review, and raised concerns beyond the proper scope of this proceeding.⁸³ Applicants re-emphasize that in determining whether to grant waivers pursuant to HRS § 269-16.9(e) and HAR § 6-80-135, the commission has focused on whether the affected telecommunications carrier is a non-dominant carrier, in which

⁸¹Applicants request leave to submit their reply to the CA February Response, that they may respond to several issues raised therein by the Consumer Advocate, including: Applicants' opportunity to provide information specific to Hawaii such as plans for New T-Mobile's roll out of 5G, jobs, and wireless service coverage in rural and remote areas.

⁸²See Order No. 36196.

⁸³Applicants' February Reply at 4-6. Specifically, Applicants again reference the Consumer Advocate's attempt to unduly broaden the scope of this proceeding to encompass wireless issues, and additionally note that the Consumer Advocate uses the fact that Sprint Corporation has a CLEC affiliate operating in the State to suggest that the commission evaluate a wireless transaction.

case, competition serves the same interest as public interest regulation.⁸⁴

Applicants point out again that in the event the commission does not grant the requested waiver, the commission must determine: (1) whether the Indirect CLEC Acquisition will not adversely affect the carrier's (i.e., Sprint Communications) fitness, willingness and ability to provide intrastate telecommunications services as authorized by the commission;⁸⁵ and (2) whether the acquisition (i.e., of Sprint Communications) is reasonable and in the public interest.⁸⁶

Applicants reassert that even if the commission were to accept the Consumer Advocate's scope and standard of review (i.e., by considering the wireless transaction and using a "substantial net benefits test"), the transaction is in the public interest.⁸⁷ Applicants indicate that they have detailed the numerous public interest benefits that the merger would

⁸⁴The Consumer Advocate, however, suggests that the commission should instead consider impacts on competition in the wireless market. Applicants' February Reply at 6-7 (footnotes omitted).

⁸⁵The Consumer Advocate has conceded to this issue. Applicants' February Reply at 8 (footnote omitted).

⁸⁶It is on this point that Applicants and the Consumer Advocate disagree. Applicants' February Reply at 8-9 (footnote omitted).

⁸⁷Applicants' February Reply at 10.

produce for Hawaii and its consumers.⁸⁸ Applicants stress that merger benefits that extend nationally and create benefits for Hawaii as well as other states are also Hawaii-specific benefits, and that their positive impact on the State and its consumers is not diminished because they are not exclusive to Hawaii. Applicants point out that these benefits, which should be considered, include, but are not limited to: a world-leading 5G network; service to rural areas of Hawaii, a *bona fide* alternative to in-home broadband that is cost-saving; and new jobs and job protection for Hawaii.⁸⁹

F.

Consumer Advocate's Response to Applicants' Motion for Leave

As noted above, Applicants concluded that the Consumer Advocate appears to subscribe to the belief that "Hawaii-specific benefits must be "Hawaii-only" benefits.⁹⁰ The Consumer Advocate, in response thereto, asserts that

⁸⁸Applicants' February Reply at 10 (footnote omitted), wherein Applicants highlight, however, that rather than credit the overwhelming evidence of Hawaii-specific benefits in the record, the Consumer Advocate appears to believe that "Hawaii-specific" benefits must be "Hawaii-only" benefits, and as such, has rejected benefits that accrue to Hawaii and other states as "vague assertions made at the national level."

⁸⁹Applicants' February Reply at 10-14 (footnotes omitted).

⁹⁰Applicants' February Reply at 10 (footnote omitted).

"Applicants fail to understand that in seeking evidence of Hawaii-specific benefits, the Consumer Advocate sought support as to why the results from Applicants' national level analyses should be considered reasonable and credible approximations for the benefits Hawaii consumers should expect to reap as a result of the proposed transaction."⁹¹

Although the Consumer Advocate opines that many of the stated benefits in Applicants' February Reply appear to be a reiteration of benefits previously claimed and discussed in previous filings, the Consumer Advocate acknowledges Applicants' identification of new commitments related to wireless pricing and job protection.⁹² With regard to these new commitments, the Consumer Advocate questions how they "will be monitored and implemented in Hawaii" since that information was not provided in Applicants' February Reply.⁹³ Finally, acknowledging Applicants' submission of Dr. Harold Furchtgott-Roth's supplemental declaration⁹⁴ regarding estimates of the potential economic benefit

⁹¹CA March Response at 4.

⁹²CA March Response at 5. The Consumer Advocate adds, however, that Applicants have not provided new, specific information regarding "new jobs" in Hawaii. CA March Response at 6.

⁹³CA March Response at 6.

⁹⁴Exhibit A (i.e., Applicants' February Reply), which is appended to Applicants' Motion for Leave, includes a supplemental declaration (Consumer Benefits in Hawaii from the Proposed

of New T-Mobile's in-home broadband offering, the Consumer Advocate expresses its concerns regarding whether said estimates are a reasonable and credible approximation of the likely impact of the merger in Hawaii, and questions the accuracy and reliability of, among other things, supporting information related to Applicants' projections.⁹⁵

G.

Stipulation

As noted above, on April 3, 2019, the Applicants and Consumer Advocate filed the Stipulation, which states that "[t]he Applicants understand that the Consumer Advocate supports the Indirect CLEC Acquisition based upon the representations of the Applicants regarding the benefits to Hawaii customers, as set forth in the record, and the additional commitments stated in Section II, herein[,]” including:

- (1) Applicants voluntarily offer the following verifiable 5G coverage representation: New T-Mobile will strive to deliver, using industry best practices and barring factors beyond its control, 5G coverage to ninety percent (90%) of its FCC licensed covered POPs⁹⁶ throughout the State of Hawaii within

T-Mobile-Sprint Merger) by Harold Furchtgott-Roth (President, Furchtgott-Roth Economic Enterprises, Washington, DC), dated February 2019.

⁹⁵CA March Response at 6-8.

⁹⁶“POPs” stands for “points of presence.”

three to five years from the Merger's closing;
[and]

- (2) Beginning one year after the Merger's closing and for every year thereafter through 2024, Applicants will voluntarily meet with the Consumer Advocate and PUC, on an annual basis to review, for informational purposes only, New T-Mobile's FCC Mobile Deployment Form 477 data.⁹⁷

As a result of these commitments, the Stipulation states that the Consumer Advocate agrees both to "support, and advocate for to the extent necessary, the Commission's expeditious approval of the stipulation and the Indirect CLEC Acquisition[,]" as well as "not to oppose the Merger in any forum."⁹⁸

III.

DISCUSSION

A.

Relevant Law

Applicants indicate that the Joint Application is filed pursuant to HRS §§ 269-16.9(e), 269-7(a), and 269-19(a), as well as HAR § 6-80-135.⁹⁹ By their Joint Application, Applicants are seeking a waiver from all regulatory requirements relating to the

⁹⁷Stipulation, Exhibit 1 at 2-3.

⁹⁸Stipulation, Exhibit 1 at 3.

⁹⁹See Joint Application at 2.

Indirect CLEC Acquisition, pursuant to HRS § 269-16.9(e) and HAR § 6-80-135 or, alternatively, approval of said acquisition, pursuant to HRS §§ 269-19(a) and 269-7(a), to the extent such relief is necessary and appropriate.

B.

Applicability of HRS § 269-16.9(e) and HAR § 6-80-135.

Pursuant to HRS § 269-16.9(e), the commission may waive the regulatory requirements applicable to telecommunications providers "when it determines that competition will serve the same purpose as public interest regulation." Similarly, HAR § 6-80-135 permits the commission, upon the written request of any person or telecommunications carrier, to waive the provisions of HRS Chapter 269 or any other telecommunications-related rule upon the commission's determination that the waiver is in the public interest.¹⁰⁰

¹⁰⁰Because the commission, by this Decision and Order, approves, subject to certain conditions, the Indirect CLEC Acquisition, pursuant to HRS §§ 269-19(a) and 269-7(a), the commission does not further address the extent of the applicability of HRS § 269-16.9(e) and HAR § 6-80-135.

C.

HRS §§ 269-7(a) and 269-19(a)

Instead, the commission turns its attention to HRS §§ 269-7(a) and 269-19(a). HRS § 269-7 sets forth the commission's investigative powers. Subsection (a) thereto states:

(a) The public utilities commission and each commissioner shall have power to examine into the condition of each public utility, the manner in which it is operated with reference to the safety or accommodation of the public, the safety, working hours, and wages of its employees, the fares and rates charged by it, the value of its physical property, the issuance by it of stocks and bonds, and the disposition of the proceeds thereof, the amount and disposition of its income, and all its financial transactions, its business relations with other persons, companies, or corporations, its compliance with all applicable state and federal laws and with the provisions of its franchise, charter, and articles of association, if any, its classifications, rules, regulations, practices, and service, and all matters of every nature affecting the relations and transactions between it and the public or persons or corporations.

HRS § 269-19(a) expressly applies to the "[m]erger and consolidation of public utilities." The commission has previously reviewed applications to transfer indirect control of telecommunications carriers under HRS § 269-19 by incorporating the standards and criteria of HRS § 269-7.5, which requires that (a) the applicant (acquiring utility) is fit, willing, and able

properly to perform the service proposed, and (b) the acquisition is reasonable and in the public interest.¹⁰¹

As noted above, the commission has recently affirmed the applicability of the "fit, willing and able" and "public interest" standards as they pertain to mergers of telecommunications carriers at the parent holding company level:

In effect, "a parent level transaction which involves the transfer of a public utility's assets and operations is reviewed by the commission under HRS § 269-7(a) to determine whether the transaction is reasonable and consistent with the public interest." Such transaction is "reasonable and in the public interest if it will not adversely affect the public utility's regulated services," as authorized by its certificate of public convenience and necessity. With respect to telecommunications carriers, a proposed financial transaction at the parent holding company level "is reasonable and consistent with the public interest if it will not adversely affect the carrier's fitness, willingness, and ability to provide intrastate telecommunications services in the State, as authorized by the commission."¹⁰²

Before applying these standards to the Joint Application, the commission clarifies that the "fit, willing, and able" and "public interest" criteria represent two distinct

¹⁰¹See the Cincinnati Bell Decision at 14 (citing In re Citizens Comm. Co., Docket No. 02-0060, Decision and Order No. 19658, filed September 17, 2002, at 14-15).

¹⁰²See In re Charter Comm., Inc., Docket No. 2015-0207, Decision and Order No. 33602, filed March 24, 2016 ("Decision and Order No. 33602"), at 18-19.

standards that must be independently met.¹⁰³ That being said, the commission emphasizes that the standards are essential to HRS § 269-7.5 (and, by extension, HRS § 269-19) and must be independently satisfied.¹⁰⁴ The commission has recently explained that review of a proposed transaction's satisfaction of the "public interest" standard is distinct from an applicant's satisfaction of the "fit, willing, and able" standard.¹⁰⁵ The commission thus reviews this transaction to determine whether it is reasonable and consistent with the public interest, in addition to an examination into T-Mobile USA's fitness, willingness, and ability to provide the proposed services.

¹⁰³More specifically, the "fit, willing, and able" standard refers to the Applicant(s), in that the acquiring entity must be fit, willing, and able to perform the service(s) currently offered by the utility being acquired, whereas the "public interest" standard pertains to the underlying proposed transfer of control, in that the terms and conditions of the proposed transfer are in the public's interest. See Cincinnati Bell Decision at 15 n.35.

¹⁰⁴See Order No. 34854, "(1) Establishing Statement of Issues; (2) Addressing Motions to Intervene; and (3) Instructing the Parties to Submit a Proposed Procedural Schedule," filed October 2, 2017, in Docket No. 2017-0208, at 18.

¹⁰⁵See Order No. 33795 (finding that while the applicants had satisfied the "fit, willing, and able" standard, they had failed to meet the "public interest" standard).

D.

Whether T-Mobile USA is Fit, Willing, And Able

The commission, after reviewing the record in this proceeding, finds that T-Mobile USA is fit, willing, and able to properly perform the intrastate telecommunications services currently offered by Sprint Communications.

1.

Fit

Applicants and the Consumer Advocate do not dispute that T-Mobile USA demonstrates financial fitness to provide the regulated utility service. Specifically, Applicants have represented that for 2017, "T-Mobile reported \$40.6B of total revenues and \$4.5B of net income and total assets of \$70.6B."¹⁰⁶ And "[f]or Sprint, it reported for the year ending March 31, 2018, net operating revenues of \$32.4B and \$7.4B of net income and total assets of \$84.5B."¹⁰⁷ Based in part on the foregoing,

¹⁰⁶CA SOP at 9 n.17. Applicants also represent that "T-Mobile has a market capitalization of \$59.2 billion, total revenues of \$10.8 billion, adjusted EBITDA [earnings before interest, taxes, depreciation and amortization] of \$3.2 billion, free cash flow of \$890 million, 1.6 million total net subscriber additions in Q3 2018, and branded postpaid churn of only 1.02%, evidencing its fitness and ability to provide intrastate telecommunications services." Applicants' CA SOP Response at 8 (footnotes omitted).

¹⁰⁷CA SOP at 9 n.17.

the Consumer Advocate concluded that "the standard for financial fitness has been met in this circumstance."¹⁰⁸

Moreover, the commission finds that the Indirect CLEC Acquisition will increase the managerial, technical, and financial resources available to Sprint Communications.¹⁰⁹

2.

Willing

Applicants and the Consumer Advocate do not dispute that T-Mobile USA demonstrates the willingness to provide the regulated utility service currently offered and provided by Sprint Communications. Given that Applicants, by the Joint Application, are seeking commission approval of the Indirect CLEC Acquisition, the Consumer Advocate concluded that "it appears evident that the entities are willing to continue providing the services they provide to their customers in the future."¹¹⁰ This appearance of willingness to continue providing the regulated utility service currently offered and provided by Sprint Communications is confirmed by Applicants' representation that "[u]pon consummation of the Indirect CLEC Acquisition, Sprint Communications will

¹⁰⁸CA SOP at 9.

¹⁰⁹Joint Application at 10.

¹¹⁰CA SOP at 9 n.16.

continue to provide the services that it currently provides to customers in this State, subject to Sprint Communications' existing plans to discontinue its TDM services and transition customers to Internet Protocol ('IP') services. All existing Sprint Communications contracts will be honored, including transitioning customers to IP services."¹¹¹

3.

Able

Applicants and the Consumer Advocate do not dispute that T-Mobile USA demonstrates the ability to provide the regulated utility service currently offered and provided by Sprint Communications. T-Mobile USA is a subsidiary of T-Mobile, which, as the third largest wireless carrier in the United States, is a well-established telecommunications carrier, serving approximately 72.6 million customers under the T-Mobile and MetroPCS brands.¹¹² Applicants represent that upon closing of the Indirect CLEC Acquisition: (1) the current CEO of T-Mobile will serve as Chief Executive Officer of New T-Mobile; and (2) the current President and Chief Operating Officer of T-Mobile will

¹¹¹Joint Application at 10. See Ordering Paragraph No. 1.D, below.

¹¹²Applicants' CA SOP Response, Exhibit B at 1 (footnote omitted).

serve as President and Chief Operating Officer of New T-Mobile.¹¹³ This continuity in management should serve to affirmatively support and confirm T-Mobile USA's ability to provide the regulated utility service currently offered and provided by Sprint Communications. In support of T-Mobile USA's ability to provide the above-referenced services, the Consumer Advocate indicated that "[u]nlike other transactions that involve a regulated entity and an unregulated entity, both parties currently provide telecommunications services in Hawaii."¹¹⁴ Understanding the services that are provided by the Applicants, the Consumer Advocate "believes that the question of technical and managerial fitness and ability are addressed adequately."¹¹⁵

Based on the foregoing, the commission concludes that Applicants have satisfactorily demonstrated that T-Mobile USA is fit, willing, and able to properly perform the intrastate telecommunications services currently offered by Sprint Communications.

¹¹³Response to CA IRs at 9 (Applicants' Response to CA-IR-4).

¹¹⁴CA SOP at 8.

¹¹⁵CA SOP at 8.

E.

Whether the Indirect CLEC Acquisition is in the Public Interest

The commission, upon review of the record in this proceeding, finds that the Indirect CLEC Acquisition is in the public interest, provided that certain conditions are adopted. The commission acknowledges the Parties' positions on public interest,¹¹⁶ however, with respect to whether the acquisition is in the public interest, the commission considers the recent guidance set forth in Appendix A (as explained below), and the Indirect CLEC Acquisition's holistic impact upon wireline and wireless competition, and customers and consumers (including Applicants' customers and consumers), in the context of the State's telecommunications market.¹¹⁷

¹¹⁶According to Applicants, a transfer is reasonable and consistent with the public interest if it "will not adversely affect the carrier's fitness, willingness, and ability to provide intrastate telecommunications services in the State as authorized by the commission." Joint Application at 9 (footnotes omitted). The Consumer Advocate, who references Appendix A, maintains that it is necessary for Applicants to establish that the Indirect CLEC Acquisition "will result in clear and quantifiable benefits to Hawaii consumers to meet the public interest standard." CA SOP at 11.

¹¹⁷In this regard, the commission does not consider the XO Decision as dispositive in the instant proceeding, because it specifically relates to the application of a "no detriment" standard of review when examining applications pursuant to HRS §§ 269-7(a) and 269-19, and when considering impacts on the telecommunications market for wireline services in the context of a waiver.

As earlier enunciated, the transaction will have no competitive impact on the provision of wireline services to Applicants' customers in the State,¹¹⁸ or to the merging entities' wireless customers in the State, but instead, will increase competition and create significant benefits for those customers and consumers of telecommunications services in the State. For example, Applicants represent that within five (5) years (i.e., by 2024), the New T-Mobile network will have approximately doubled the total capacity and tripled the total 5G capacity of T-Mobile and Sprint combined.¹¹⁹

Hawaii's unique geography requires a diversity of infrastructure and technologies to provide broadband connectivity across the State - including the need for transpacific and interisland undersea cables, to reach remote areas throughout the State, and to keep quality broadband service affordable in less densely populated areas. In August 2011,

¹¹⁸For instance, the number of wireline intrastate telecommunications providers operating in Hawaii prior to, and after consummation of the acquisition will be the same. Applicants' CA SOP Response at 13 (footnote omitted).

¹¹⁹New T-Mobile's national 5G network will incentivize Verizon, AT&T, and other wireless providers to respond competitively, resulting in as much as a 55% decrease in price per GB and a 120% increase in cellular data supply for all wireless customers. Importantly, customers will benefit by the merged entity's ability to "increase competitive pressures on competing service providers." Applicants' CA SOP Response at 15-16 (footnotes omitted).

Hawaii launched the Hawaii Broadband Initiative to improve connectivity throughout the State, with the ultimate goal of ensuring all of Hawaii's citizens have access to ultra-high-speed broadband at affordable prices, and in 2012, the State introduced its State Broadband Strategic Plan.¹²⁰ As a result, various State agencies have continued to support broadband activities that have been directed by statute, enabled by grants, or executed in furtherance of the Hawaii Broadband Initiative, in line with the State's stated policies on broadband expansion, which the commission believes this transaction has the potential to support.

In addition to Applicants' commitments regarding 5G infrastructure, Applicants additionally reference New T-Mobile's intention to pass scale benefits on to customers, and specifically state that New T-Mobile "projects passing scale benefits on to customers in the form of an over 6 percent reduction in annual revenue per user ("ARPU") by 2026."¹²¹

¹²⁰Hawaii Broadband Strategic Plan (2012), available at: https://docs.google.com/viewerng/viewer?url=https://cca.hawaii.gov/broadband/files/2015/01/Hawaii_Broadband_Strategic_Plan_Dec_2012.pdf&hl=en_US

¹²¹See: Applicants' Supplemental IR Response, Exhibit CA-IR-5(a) (Applicants' Public Interest Statement) at 21; Ordering Paragraph No. 1.E, below.

With respect to harm to the merging entities' customers, Applicants specify that T-Mobile has no wireline customers in the State, and as such, there can be no harm to that category of customers. According to Applicants, Sprint Communications was providing regulated intrastate voice telecommunications services to only two enterprise customers, one of whom has disconnected from service, and one who is scheduled to disconnect in 2019.¹²² Moreover, Applicants declare that Sprint Communications' contractual obligations as the TRS provider in Hawaii will be fully complied with. In this regard, the acquisition will be seamless to Sprint Communications' customers, and will not impact them.¹²³

Applicants assert that the acquisition, which will allow Sprint Communications to become part of a much larger entity with increased managerial, technical, and financial resources, will benefit existing Sprint Communications' customers by creating the opportunity to deploy a more extensive network, and offer a wider array of enterprise services that can be bundled with wireless services.¹²⁴

¹²²Applicants' CA SOP Response at 13-14 (footnote omitted), wherein Applicants clarify that Sprint Communications' service to the remaining customer will remain unchanged.

¹²³Applicants' CA SOP Response at 14 (footnotes omitted); Applicants' Response to CA IRs (Response to CA-IR-3(b)).

¹²⁴Applicants' CA SOP Response at 15.

As Applicants avouch, the transaction will result in significant public benefits accruing to Hawaii and Hawaii consumers (i.e., the New T-Mobile Benefits).¹²⁵ Other benefits resulting from the acquisition include increased data and improved service at lower prices for all Hawaii consumers (price reduction benefits associated with a six percent reduction in average revenue per use as well as a 55 percent decrease in price per GB, and a 120 percent increase in cellular data supply),¹²⁶ and new jobs and job protection for Hawaii.¹²⁷

Finally, Applicants represent that the merger would provide "other benefits," because it would also lower resale and MVNO prices in the State (including prices for TracFone which

¹²⁵Applicants' CA SOP Response at 15-27 (footnotes omitted). With regard to the 5G network, Applicants represent that it will have 5G speeds approximately four to six times what either T-Mobile or Sprint could achieve on their own by 2024. Applicants' February Reply at 10-11 (footnote omitted).

¹²⁶Applicants' February Reply at 11 (footnote omitted).

¹²⁷New T-Mobile will create thousands of additional jobs as it will need to hire employees to build the new network. Nationally, New T-Mobile will need approximately 3,600 additional employees in its first year, and more than 11,000 by 2024, than the standalone companies combined without the merger. Many of these jobs will be in Hawaii, and, as such, represent a Hawaii-specific benefit. Regarding "job protection," T-Mobile's CEO has "committed to offering every single W-2 retail employee of T-Mobile and Sprint a job with the New T-Mobile." This is a national commitment, and is, therefore, also a Hawaii commitment. Applicants' February Reply at 13 (footnotes omitted). See Ordering Paragraph No. 1.A, below.

operates throughout the State), and IT would improve enterprise capabilities across the State.¹²⁸

F.

Applicability of Order No. 33795 Appendix A

The commission notes that Appendix A is not directly applicable to this proceeding.¹²⁹ As the express language of Appendix A reflects, it is intended as guidance "on key elements that would be necessary to meet the public interest standard in any future applications seeking a change in control of the H[awaiian Electric] Companies."¹³⁰ This is not to say that the elements set forth in Appendix A are completely inapplicable to the proposed merger; considerations such as ratepayer benefits, mitigation of risk, effects on competition, and corporate governance are, to a certain degree, pertinent factors in any proposed change of control proceeding. However, as noted by the Consumer Advocate, some of the elements are not directly applicable to Applicants.¹³¹ Accordingly, while not treating

¹²⁸Applicants' February Reply at 13 (footnotes omitted).

¹²⁹See Order No. 33795, Appendix A at 1.

¹³⁰Order No. 33795, Appendix A at 1 (emphasis added).

¹³¹ As it relates to mitigation of risk, the Consumer Advocate "is not aware of any business operations that either of the Applicants engage in that would increase the existing risk that each of the Applicants face already. And relating to corporate

Appendix A as directly applicable to this proceeding, the commission has considered its underlying concerns, and based on the foregoing discussion, including the Consumer Advocate's opinion, the commission agrees that only the following two Appendix A factors are relevant in the instant proceeding - ratepayer benefits and effects on competition.

Importantly, Applicants have addressed how the Indirect CLEC Acquisition will not harm wireline competition or customers in the State,¹³² but instead, how it will provide a benefit to both.¹³³ Additionally, Applicants have addressed how the Indirect CLEC Acquisition will not harm wireless competition in the State,

governance, the Consumer Advocate adds that "given the existing corporate organization that each of the Applicants belong to, the Consumer Advocate does not believe that corporate governance is an issue that needs attention in the instant proceeding." CA SOP at 10.

¹³²Applicants' CA SOP Response at 13, wherein Applicants represent, among other things, that T-Mobile neither offers wireline services in Hawaii, nor owns any infrastructure in the State that is used or may be used for the provision of such services. In fact, there will be the same number of wireline intrastate telecommunications providers operating in the State immediately after consummation of the Indirect CLEC Acquisition as there were just prior to it.

¹³³Sprint Communications' customers will benefit from the acquisition, because the acquisition will create the opportunity for Sprint Communications to deploy a more extensive network, offer a wider array of services that can be bundled with wireless services, and compete more effectively in the telecommunications marketplace. Applicants' CA SOP Response at 14-15.

but instead, how it will intensify competition and will benefit T-Mobile and Sprint customers and consumers.¹³⁴

Further, to support assurances that the proposed acquisition will not negatively affect competition or customers, the commission, as previously discussed, imposes conditions¹³⁵ to, among other things, track the current number of Applicants' direct employees in Hawaii, and promotion of subscriber savings through at least 2026.

Based on the foregoing, the commission believes the record demonstrates that the ratepayer benefits and effects on competition considerations of Appendix A are satisfied under these circumstances.

IV.

SUMMARY OF FINDINGS AND CONCLUSIONS

Given the commission's findings above regarding T-Mobile's fitness, willingness, and ability to provide the regulated utility service currently offered and provided by Sprint Communications, and the commission's findings related to the

¹³⁴See the New T-Mobile Benefits (Applicants' CA SOP Response at 15-27).

¹³⁵The conditions are set forth in detail, in Ordering Paragraph No. 1, below.

public interest (and Appendix A considerations), the commission approves the Indirect CLEC Acquisition as reasonable and in the public interest, subject to the conditions set forth in Ordering Paragraph No. 1, below.¹³⁶

V.

ORDERS

THE COMMISSION ORDERS:

1. Applicants' Joint Application is approved, as set forth in this Order, subject to the following conditions:

A. In the interest of verifying T-Mobile's commitment to offering every single W-2 retail employee of T-Mobile and Sprint a job with New T-Mobile, on the third anniversary of the closing of the merger ("merger closing"), Applicants shall file a report with the commission of the total number of W-2 employees of New T-Mobile, and if the number has decreased from the total number of W-2 retail employees of T-Mobile and Sprint as of the date of this Order, Applicants shall provide an explanation for the decrease.

B. Pursuant to the Parties' April 3, 2019 Stipulation, and consistent with the State's stated policies on broadband

¹³⁶In conditionally approving the Indirect CLEC Acquisition as reasonable and in the public interest, the commission acknowledges and adopts the Parties' April 3, 2019 Stipulation.

expansion, New T-Mobile will strive to deliver, using industry best practices and barring factors beyond its control, 5G coverage to ninety percent (90%) of its FCC licensed covered POPs throughout the State of Hawaii within three to five years from the merger closing.

C. Pursuant to the Parties' April 3, 2019 Stipulation, and consistent with the State's stated policies on broadband expansion, beginning one year after the merger closing and for every year thereafter through 2024, Applicants will voluntarily meet with the Consumer Advocate and PUC, on an annual basis to review, for informational purposes only, New T-Mobile's FCC Mobile Deployment Form 477 data.

D. All existing Sprint Communications Company L.P. contracts shall be honored, including transitioning customers to IP services.

E. On the third anniversary of the merger closing, Applicants shall file a report with the commission demonstrating New T-Mobile's progress toward meeting its projected price reduction in ARPU. Thereafter, Applicants shall file an annual progress report by March 31 of each year (through and including 2026), demonstrating New T-Mobile's progress toward meeting its projected price reduction in ARPU.

2. The failure to timely comply with any of the applicable conditions set forth in Ordering Paragraph 1, above,

may cause the commission to void this Decision and Order, and it may result in further regulatory action as authorized by state of Hawaii law.

3. In the event the FCC denies the merger transaction, the commission's approval of the acquisition, i.e., this Decision and Order, shall be void.

DONE at Honolulu, Hawaii MAY 30 2019.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By James P. Griffin
James P. Griffin, Chair

By Jennifer M. Potter
Jennifer M. Potter, Commissioner

By Leodoloff R. Asuncion, Jr.
Leodoloff R. Asuncion, Jr., Commissioner

APPROVED AS TO FORM:

Melissa M. Mash
Melissa M. Mash
Commission Counsel

2018-0157.mho

CERTIFICATE OF SERVICE

The foregoing order was served on the date of filing by mail,
postage prepaid, and properly addressed to the following parties:

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